Supreme Court, U.S.
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No. 96-1109

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ANN DAVIS,
Petitioner,
v.
AT&T COMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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February 13, 1997

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QUESTIONS PRESENTED

1. Whether Title VII cases should be subject to Federal Rule of Civil Procedure 56, whereby summary judgment is granted in the absence of a genuine issue of material fact.

2. Whether the court below properly determined that petitioner failed to proffer admissible or probative evidence that the defendant's reason for its adverse employment action was pretextual.

STATEMENT REQUIRED BY RULE 29.6

Respondent AT&T Communications, Inc., is a wholly owned subsidiary of AT&T Corp. and has no subsidiaries itself.

AT&T Corp., AT&T Communications, Inc.'s parent company, owns an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong).

AT&T Corp. owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

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This case does not raise the questions of the conflict the petition purports to present. In an unpublished decision the Eleventh Circuit simply affirmed a grant of summary judgment based on the routine application of well-settled principles to a particular set of uncontested facts. Those facts show that petitioner was not subjected to an unlawful retaliatory discharge; she was fired because she refused to return to work.

1. Petitioner began her employment with respondent ("AT&T") in 1965 in Hendersonville, North Carolina. Pet. App. 19a. In 1990, she took a position as Facilities Planner for AT&T in Atlanta. *Id.* In Atlanta, petitioner had "a very demanding supervisor," Larry Newton, who often used demeaning and inappropriate language in the office. *Id.* at 2a. Newton was reassigned in April 1991 and by May had no responsibility over petitioner's work

group. *Id.* at 4a. Following Newton's reassignment, petitioner complained informally about his behavior and then contacted AT&T's EEO department in August 1991 and filed a formal sexual harassment complaint. *Id.* at 22a. AT&T's EEO department conducted an investigation, as a result of which Newton was disciplined, required to attend diversity training classes, and given a lowered performance appraisal, effectively reducing his salary. *Id.* at 5a, 22a-23a.

In August 1991, AT&T granted petitioner a leave of absence with disability benefits for stress-related depression. *Id.* at 5a, 21a-22a. Five months later, AT&T directed her to return to work based on her psychologist's conclusion that she was " 'certainly capable of performing some type of work.' " *Id.* at 23a, 5a. Petitioner was given a new job responsibility with a lighter work load and placed under a new supervisor. *Id.* Upon her return to work, petitioner filed a sex discrimination charge with the EEOC based on Newton's past conduct. *Id.* at 5a.

In June 1992, AT&T granted petitioner a second paid disability leave due to depression. *Id.* at 23a, 5a. The next month she filed a complaint, alleging, *inter alia,* that AT&T and Newton had violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), by creating a hostile work environment and subjecting her to disparate treatment on account of her sex.

In November 1992, petitioner's disability case manager directed her to undergo a second, independent, medical examination. *Id.* at 24a. After the examining psychiatrist determined that petitioner could work, petitioner's supervisor directed her to return to work by December 28, 1992. *Id.* at 6a, 24a. In connection with her lawsuit, petitioner testified that she would not work for AT&T in Atlanta, but admitted that she could work for another employer in North Carolina, where she had since returned. *Id.* Petitioner's supervisor wrote to her again, offering her a job in North Carolina and extending her return-to-work

date until January 4, 1993. *Id.* at 6a, 24a-25a. Petitioner still refused to return to work, and on January 11, 1993, AT&T fired her for abandoning her job. *Id.* at 6a, 25a. Petitioner then amended her complaint to allege that her discharge violated Title VII, 42 U.S.C. § 2000e-3(a), the Employee Retirement Income Security Act, and the Americans With Disabilities Act.

The district court below, in large part adopting the recommendations of a magistrate judge, granted AT&T summary judgment against petitioner on all of her claims. *Id.* at 43a. With respect to her claim of retaliatory discharge—the claim at issue in this petition—the district court held that, although petitioner had made out a prima facie case based on the "relatively short time" between the filing of her lawsuit and her discharge, AT&T had met its burden under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), of providing a legitimate, nondiscriminatory reason for firing petitioner—her admitted refusal to return to work. *Id.* at 41a. The district court found that petitioner's evidence of pretext—a handwritten memorandum from the psychiatrist's office containing the word "lawsuit"—did not tend to show that petitioner's lawsuit against AT&T had been a factor in the decision to decertify her disability status, or subsequently, to discharge her. *Id.* at 42a. In addition, the district court found that petitioner's own testimony that "she would never work in Atlanta again and that she would not return to AT&T under any circumstances for 10 to 15 years," refuted her pretext claim. *Id.*

The Eleventh Circuit affirmed in an unreported decision. The court of appeals held that the petitioner's only evidence of AT&T's alleged pretext in firing her, the handwritten memorandum from the psychiatrist's office, was neither admissible nor probative evidence. *Id.* at 14a. According to petitioner, the word "lawsuit" on the memorandum indicated that AT&T's disability manager was aware of petitioner's lawsuit, and thus demonstrated that

AT&T had a retaliatory motive when it ended petitioner's disability status and directed her to report to work. *Id.* at 15a. The court of appeals held that this claim was "simply not plausible." *Id.*

2. The decision below raises no issue worthy of this Court's review. According to petitioner herself, the federal courts have "continuously and persistently" rejected her argument that summary judgment can *never* be granted where the plaintiff has made out a prima facie case of discrimination. Pet. at 13. Petitioner also acknowledges that neither of the courts below "consider[ed], address[ed], or discuss[ed]" this argument. *Id.* Petitioner's novel assertion that "summary disposition of employment discrimination claims is not permitted under [Federal] Rule [of Civil Procedure] 56," *id.* at 17, is unsupported and should not be considered by this Court for the first time on review.

Petitioner's claim also rests on the mistaken belief that the evidentiary framework established by *McDonnell Douglas* somehow alters summary judgment standards. Under *McDonnell Douglas,* a defendant may rebut a prima facie showing of retaliatory discharge by proffering "a legitimate, nondiscriminatory reason" for the challenged employment action, in which case the presumption of unlawful conduct "simply drops out of the picture." *St. Mary's Honor Ctr.* v. *Hicks,* 509 U.S. 502, 506-07, 511 (1993) (internal quotation omitted). Petitioner argues that the issue of AT&T's alleged retaliatory intent is one of fact. Summary judgment, however, is routinely granted on factual matters where the nonmovant has failed to demonstrate the existence of a "genuine issue." Petitioner provides no reason why Title VII cases—where a prima facie case can be made with little effort, *Hicks,* 509 U.S. at 515, and was made in this case based solely on the "relatively short time" between the filing of petitioner's suit and her discharge—should not be subject to summary judgment once the presumption of wrongdoing has been

rebutted. *Cf. Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) (summary judgment not disfavored in factually complex antitrust suits). Indeed, the blanket exemption from Rule 56 that petitioner seeks would require countless trials in Title VII cases where no genuine issue of material fact exists. Petitioner's claim of legal error is thus mistaken, and does not warrant the Court's review.

3. Petitioner argues in the alternative that summary judgment is *never* proper where the plaintiff presents evidence that the defendant's proffered nondiscriminatory reason is pretextual, even in the absence of evidence that the defendant's true motivation was discriminatory. This alternative argument, however, is not presented in this case.

First, the Eleventh Circuit specifically held that the only evidence supporting petitioner's claim of pretext—the handwritten memorandum from the psychiatrist's office—was neither admissible nor probative. Pet. App. at 14a. This factual determination, which is both correct and, in all events, undeserving of this Court's review, precludes consideration of petitioner's legal claim.[1]

Second, because of this finding, the court below did not even address the issue on which petitioner asserts the courts of appeals have split, *i.e.*, whether a plaintiff's evidence of pretext must also permit the inference of intentional discrimination in order to avoid summary judgment. As a result, petitioner aims her criticism, not at the decision below, but at another Eleventh Circuit

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[1] Any suggestion that petitioner's " 'suspicion of mendacity' " constitutes evidence sufficient to present the issue she seeks to raise, Pet. at 21 (quoting *Hicks*, 509 U.S. at 511), is mistaken. Such a suspicion must be accompanied by "disbelief of the reasons put forward by the defendant." *Hicks*, 509 U.S. at 511. Here, petitioner's own testimony that she refused to return to work confirms, rather than discredits, AT&T's claim that it had a nondiscriminatory reason for terminating petitioner.

case, *Isenberg* v. *Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996), Pet. at 18, which the decision below does not purport to follow. Because the court below did not rule on the legal issue petitioner seeks to raise, this case is not an appropriate vehicle for the Court to review this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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